

VENDOR OPERATING PROCEDURES MANUAL

SECTION XI

ADMINISTRATIVE REVIEW, EVIDENTIARY HEARING AND ARBITRATION PROCEDURES

11.1. Administrative Review Procedures

11.1.1. Procedures.

A. A vendor or his/her designee (who may be a member of the State Committee of Blind Vendors) may request in writing within 15 working days of the occurrence of the action, an Administrative Review of an action by the DSB arising from the operation or administration of the Vending Facility Program with which the vendor is dissatisfied. This review will be made only by a member or members of the administrative staff of the DSB who has not participated in the action in question.

B. 1. The Administrative Review will be held at a time and place convenient to the vendor requesting the review.

2. The Administrative Review will be conducted within 15 working days after receipt by the DSB of such a request.

C. If needed, transportation, reader services, or other communication services will be arranged for the vendor by the DSB. If the administrative review is held during regular operational hours of the location, the Vending Facility Program Office will provide relief at no cost to the vendor.

D. Documentation of the written request for the Administrative Review and actions and decisions resulting from the review shall be maintained as part of the official record of the Administrative Review process.

E. When an Administrative Review does not resolve a dispute to the satisfaction of the vendor, the vendor may request a Full Evidentiary Hearing.

11.2. Full Evidentiary Hearing Procedures

When a vendor is dissatisfied with an action by the DSB arising from the operation or

administration of the Vending Facility Program, the vendor may file a complaint with the DSB requesting a Full Evidentiary Hearing. The complaint shall identify one or more disputed issues to be resolved in an Evidentiary Hearing. Complaints concerning actions taken by the DSB which are required by law are not appropriate for resolution through an Evidentiary Hearing since Evidentiary Hearings cannot settle issues of law. Adherence of the DSB to its policies and consistency of application of its policies are examples of issues of fact which, if disputed, can be resolved through the Evidentiary Hearing process.

11.2.1. Procedures.

A. Vendors shall be informed in writing of their rights to a to a Full Evidentiary Hearing and of the procedures for obtaining it at the time they are licensed.

B. If a vendor requests an Evidentiary Hearing, such a request must be made within 15 working days after the adverse decision of an Administrative Review.

C. A vendor must request an Evidentiary Hearing in writing. This request must be transmitted to the Commissioner of the DSB personally or by certified mail, return receipt requested. This request may be transmitted through the State Committee of Blind Vendors.

D. A vendor is entitled to legal counsel or other representation at his own expense or through legal services available in the community.

E. 1. Reader services or other communication services will be arranged for the vendor should he request them.

2. Transportation costs and per diem shall be provided to the vendor if the Evidentiary Hearing is in a city other than the legal residence of the vendor.

F. 1. The hearing will be held at a time and place convenient and accessible to the vendor. A hearing held during regular working hours and located at the State Office, DSB, may be deemed as a convenient time and location.

2. The hearing will be scheduled by the DSB within 15 working days of the receipt of the request unless the DSB and the vendor

mutually agree, in writing, to some other period of time.

3. The vendor shall be notified in writing of the time and place of the hearing and of his/her right to be represented by legal or other counsel. This notice shall be sent to the vendor by way of certified or registered mail.

4. The vendor shall be provided with a copy of the hearing procedures and other relevant information necessary to enable him to prepare his case for the hearing.

G. A panel consisting of three persons will hear the evidence. The vendor shall select one representative, and the DSB will select a representative. The vendor's representative and the agency's representative shall then select the third member of the panel. The third person selected shall then serve as panel chairperson.

H. 1. This panel shall conduct the hearing, avoid delays, maintain order, and make sufficient record of the proceedings for a full and true disclosure of the facts and issues

2. This panel shall have all powers authorized by law and may make all procedural and evidentiary rulings necessary for the conduct of the hearing.

3. The hearing shall be open to the public at the discretion of the vendor.

I. Both the vendor and the DSB are entitled to present their case by oral or documentary evidence, to submit rebuttal evidence and to conduct such examinations and cross-examinations of witnesses as may be required for a full and true disclosure of all facts affecting the issues.

J. 1. All papers and documents introduced into evidence at the hearing shall be filed with the presiding officer, and provided to the other party.

2. All documents and other evidence submitted shall be open to examination by the parties and

opportunities shall be given to refute facts and arguments presented on either side of the issue.

K. 1. A transcript shall be made of the oral evidence and shall be made available to the parties.

2. The DSB shall pay all transcript costs and shall provide the vendor with a copy of the transcript.

L. The transcript, exhibits, and all papers and documents filed in the hearing shall constitute the exclusive record for the decision.

M. 1. The decision of the panel shall set forth the principal issues and relevant facts presented at the hearing and the applicable provision in law, regulation, and agency policy.

2. The decision shall contain findings of fact and conclusions with respect to each of the issues and the reasons for such conclusions.

3. The decision shall set forth any corrective actions necessary to resolve the issues in dispute.

4. The decision shall be made within 15 working days after receipt of the transcript.

5. The decision shall be mailed promptly to the vendor and the DSB.

N. If the vendor is dissatisfied with the decision rendered after a Full Evidentiary Hearing, he/she may request that an Arbitration Panel be convened by filing a complaint with the Secretary of the Federal Department of Education.

11.3. Arbitration Procedures

The policies for the convening of an Ad Hoc Arbitration Panel provided for by Sections 5(a) and 6 of the Act and Sections 395.6(e) and 395.13 of the Regulations, and the procedures governing the designation of the Arbitration Panel members, the notices to be given, the conduct of the arbitration including the authority and duties of the panel and the rights of the parties, the decision making by the panel, and the rights of appeal from the decision, are as follows:

11.3.1. Definitions.

As used in this document:

- A. "Act" means the Randolph-Sheppard Act Amendments of 1974, Title II of P.L. 93-516.
- B. "Party" or "Parties" means one or both as the context indicates, of the complainant blind vendor and the DSB.
- C. "Secretary" means the Secretary of the Department of Education.
- D. "Regulations" means the regulations at 34 CFR 395.1 et seq.

11.3.2. Communications.

- A. All communications, including originals and copies of required notices, pleadings, motions, petitions, and briefs, in connection with and related to the arbitration, between the parties, between a party and the Secretary, between a party and the Arbitration Panel, between the parties or the Arbitration Panel and the Arbitration Clerk or the Bureau for the Blind and Visually Handicapped of the Rehabilitation Services Administration, shall be in writing transmitted by registered or certified mail, return receipt requested.
- B. A copy of the complaint shall be sent by the blind vendor to the DSB. Thereafter, all communications and sufficient copies thereof will be transmitted to the Arbitration Clerk in the Bureau for the Blind and Visually Handicapped who will maintain the official docket of the Arbitration Proceeding and who will transmit promptly the original or the copies to the parties and the Arbitration Panel, as may be appropriate, and, as may be necessary, to the Bureau for the Blind and Visually Handicapped.

11.3.3. Complaint by Blind Vendor.

- A. If a blind vendor, after he has been provided a Full Evidentiary Hearing by the DSB as provided in Section 5(a) of the Act and Sections 395.6(e) and 395.13(a) of the Regulations, is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a written complaint with the Secretary.

B. The complaint shall set forth the action or actions arising from the operation or administration of the Vending Facility Program by the DSB which constituted the basis for the request by the blind vendor for a Full Evidentiary Hearing; the date and place of the Full Evidentiary Hearing; the decision rendered as a result of the hearing, and any action taken as a result of the hearing; the specific part or parts of the decision rendered as a result of the hearing with which the blind vendor is dissatisfied and the reasons for such dissatisfaction; the specific action or actions taken as a result of the hearing with which the blind vendor is dissatisfied and the reasons for such dissatisfaction; and a statement of the relief which the blind vendor is seeking to obtain from the DSB. Any written decision rendered as a result of the Full Evidentiary Hearing shall be attached to the complaint as an exhibit.

11.3.4. Arbitration Clerk.

Upon receipt of the complaint by the Secretary, it will be forwarded promptly to the designated Arbitration Clerk in the Bureau for the Blind and Visually Handicapped, Rehabilitation Services Administration, Department of Education. Within 7 days of receipt of the Arbitration Clerk, the complaint will be docketed and its receipt acknowledged to the blind vendor and the DSB

11.3.5. Review and Disposition of Complaint.

After the complaint has been docketed, it will be reviewed by the Bureau for the Blind and Visually Handicapped. No later than 30 days after acknowledgment of the complaint, the parties will be notified of the results of the review as follows:

A. If the complaint alleges sufficient relevant and material facts which, if proved, would entitle the blind vendor to any of the relief sought and if any of the relief sought is within the authority of the Arbitration Panel to grant, the parties will be notified that an Ad Hoc Arbitration Panel will be convened.

B. If the complaint fails to allege sufficient relevant and material facts which, if proved, would entitle blind vendor to any of the relief sought; or, if none of the relief sought is within the authority of the Arbitration Panel to grant, the blind vendor will be so notified in writing together with a statement of the reasons therefor and given an opportunity to amend the complaint within 15 days from the date of the notice.

C. If the blind vendor does not file a timely amendment to the complaint, the parties will be notified in writing that the complaint is dismissed.

D. If the blind vendor files a timely amendment to the complaint, the parties will be notified of the sufficiency of the amended complaint expeditiously (normally not to exceed 15 days) after receipt of the amendment. If it is determined that the amended complaint alleges sufficient relevant and material facts and that any of the relief sought is within the authority of the Arbitration Panel to grant, the notice will inform the parties that an Ad Hoc Arbitration Panel will be convened. If it is determined that the amended complaint fails to allege sufficient relevant and material facts or that none of the relief sought is within the power of the Arbitration Panel to grant, the notice will inform the parties that the complaint is dismissed.

E. If the complaint does not allege facts which indicate dissatisfaction with all or part of the decision rendered as a result of a Full Evidentiary Hearing, the notice will inform the parties that the complaint is dismissed.

F. If it is determined that the complaint is specious or that it has been filed solely for the purpose of harassment, the notice will inform the parties that the complaint is dismissed and will contain a statement of the reasons for the conclusion reached and the action taken.

G. If for the purpose of any decision under this section the Bureau for the Blind and Visually Handicapped, Rehabilitation Services Administration, Department of Education, and deems it necessary to obtain information in addition to that at hand, such information will be requested through the Arbitration Clerk from the parties. The request will state a reasonable period for the furnishing of the information, and the determination will be made no later than 15 days after its receipt.

H. If the complaint is dismissed for any of the reasons set forth in paragraphs C, E, or F of this subsection, such dismissal shall constitute a final agency action.

11.3.6. Designation of Arbitration Panel.

A. Within 15 days from the date of the notice informing the parties that an Arbitration Panel will be convened, each party shall designate one panel member and promptly notify the Arbitration Clerk of the designation including the name and address of the designee. Within 30 days from the date of the notice, the two panel members designated by the parties, or by the Secretary under paragraph B. of this subsection, shall designate as the third member of the panel a person who is

not an employee of the DSB, the Division of Rehabilitation Services, or Department of Human Services shall serve as panel chairperson.

B. If the Secretary, through the Arbitration Clerk, is not notified promptly by the parties of the timely designation of the panel members, and by the panel chairperson of his timely designation as such by the panel members, the Secretary will make such designation or designations on behalf of the parties or the first two panel designees.

11.3.7. Answer to Complaint.

Within 30 days from the date of the notice informing the parties that an Arbitration Panel will be convened, the DSB may file an answer to the complaint with the Arbitration Clerk. failure to file an answer will not be deemed an admission of the allegations in the complaint, nor result in the default of the DSB. The issues for arbitration and the positions of the parties thereon may be identified at the Pre-Arbitration Conference.

11.3.8. Notice of Arbitration and Pre-Arbitration Conference.

A. The Arbitration Panel, after consulting with the parties, shall schedule a reasonable date, time and place for the arbitration which shall not be later than 45 days after the designation of the panel chairperson. The panel chairperson shall notify the parties and the Arbitration Clerk of the date, time and place of the arbitration at least 30 days prior to the time scheduled.

B. The Arbitration Panel shall schedule a Pre-Arbitration Conference with the parties to settle or simplify the issues between the parties and to encourage them to resolve the issues in whole or in part. If the panel so requires, stipulations or proposed exhibits shall be exchanged at the Pre-Arbitration Conference or otherwise prior to the arbitration. The panel chairperson shall give the parties and the Arbitration Clerk reasonable notice of the date, time and place of the Pre-Arbitration Conference.

11.3.9. Conduct of the Arbitration

A. The panel chairperson shall preside over the arbitration.

B. The Arbitration Panel shall be responsible for the order, conduct, and decorum of the proceeding and shall have the authority to take all appropriate steps necessary to assure an orderly, expeditious, and fair arbitration, including, but not limited to, the following:

1. To change the date, time, and place of the arbitration, upon due notice to the parties and the Arbitration Clerk, including the authority to continue the proceeding in whole or in part.
2. To consider matters that may aid in the expeditious disposition of the arbitration.
3. To regulate participation of the parties and require them to state their position with respect to the issues in the arbitration.
4. To administer oaths and affirmations.
5. To rule on motions and other procedural items.
6. To regulate the course of the arbitration and conduct of counsel therein.
7. To examine witnesses.
8. To receive, rule on, exclude or limit evidence.
9. To fix the time for filing motions, petitions, briefs, or other items in matters pending before it.
10. To make a final agency decision for purposes of Chapter 7 of Title V, United States Code.

C. The Arbitration Panel does not have the authority to compel by subpoena the production of witnesses, papers, or other evidence.

11.3.10. Rights of Parties

The parties may:

- A. Appear by counsel or other authorized representatives in all Arbitration Proceedings.
- B. Agree to stipulations as to facts which will be made a part of the record.

C. Make brief opening statements at the arbitration which shall be limited to describing the party's position and what it intends to prove.

D. Present relevant and material evidence on the issues in the arbitration.

E. Present witnesses who will testify under oath or affirmation and who then must be available for cross-examination by the other part.

F. Present oral arguments at the arbitration.

G. Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the close of the presentation of evidence in the arbitration.

11.3.11. Rules of Evidence.

Technical rules of evidence shall not apply to the arbitration, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied by the panel chairperson. A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination. The panel chairperson may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues.

11.3.12. Depositions.

If the panel chairperson determines that the interest of justice would be served, he may authorize the taking of depositions but only if all parties are afforded an opportunity to participate in the taking of the depositions. If the DSB requested the deposition, it shall arrange at its expense for a transcript of the deposition and shall, upon request of the blind vendor, furnish such party with a copy of the transcript. If the blind vendor requested the deposition the Arbitration Clerk will arrange for the services of the reporter and for paying for such services including the costs of the transcript and necessary copies.

11.3.13. Unsponsored Written Material

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the arbitration. These data are not deemed part of the evidence or record in the arbitration.

11.3.14. Official Transcript and Record.

A. The Arbitration Clerk will designate the official reporter for all arbitration proceedings, including the taking of depositions at the request of the blind vendor pursuant to 11.3.12. Copies of transcripts may be obtained by the DSB and the public at rates not to exceed the maximum rates fixed by the contract between the Arbitration Clerk and the reporter. The blind vendor may obtain through the Arbitration Clerk a copy of the transcript to be charged as a cost of the arbitration pursuant to 11.3.16. Upon notice to the parties, the panel chairperson may authorize corrections to the transcript which involve matters of substance.

B. The transcripts of testimony, including transcripts of depositions introduced as evidence, and any pleadings motions, stipulations, exhibits, briefs, and rulings by the panel, shall be filed with the Arbitration Clerk and, except for the correspondence section of the docket, shall constitute the exclusive record for decision. If, however, a panel ruling or decision rests on official notice of a material fact not appearing in evidence in the record, the parties are entitled, on timely request, to an opportunity to show the contrary.

11.3.15. Arbitration Briefs and Decision.

A. The panel chairperson shall fix the time for filing briefs by the parties following the conclusion of the taking of evidence in the Arbitration Proceeding, and, if permitted, reply briefs. The briefs may contain proposed findings of fact and conclusions of law.

B. The Arbitration Panel shall render its decision within 30 days after the expiration of the time for filing briefs as fixed pursuant to paragraph A. of this subsection.

C. The decision of the Arbitration Panel shall be in writing and contain a statement of the rationale, including findings of

fact and conclusions of law, upon which it is based. It shall be filed promptly with the Arbitration Clerk who shall serve it promptly on the parties.

D. The decision of the Arbitration Panel is final and binding on the parties except as provided in paragraph E. of this subsection.

E. The decision of the Arbitration Panel is the final agency action on the matters adjudicated by it and is subject to appeal and review as such pursuant to Chapter 7, Title V, United States Code.

F. The decision of the Arbitration Panel is a matter of public record and will be published in the Federal Register by the Secretary through the Arbitration Clerk.

11.3.16. Costs of Arbitration.

The Secretary will pay the reasonable costs of Arbitration Proceedings hereunder which may include:

A. The salaries of panel members not to exceed that of GS-18 if they are not otherwise employed by the State or Federal governments.

B. Travel expenses and per diem costs for panel members, if not otherwise paid for from Federal funds.

C. The costs of the services of the official reporter and the official transcripts under contract with the Arbitration Clerk, not to exceed the reasonable costs for such services in the locality in which performed and furnished.

D. Travel expenses and per diem costs for witnesses unavailable at the locality of the Arbitration Proceeding and whose testimony is deemed reasonably necessary by one of the parties and approved by the arbitration chairperson.

E. If the blind vendor is unable to obtain the services of counsel without cost either through a local or State legal services program, or through an interested association or organization, reasonable fees for legal services not to exceed \$100 per day and required travel expenses without written approval of the Arbitration Clerk.